Supreme Court of the United States,

OCTOBER TERM, 1904.

WILLIAM B. WETMORE, Plaintiff in Error, AGAINST ANNETTE B. MARKOE (formerly Annette B. W. Wetmore), Defendant in Error.	No. 56,

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT IN ERROR SUBMITTED BY PERMISSION OF THE COURT.

FIRST POINT.

The argument of the plaintiff in error in the first point of his reply brief, tending to show jurisdiction in this Court, is not sound.

It is contended by the plaintiff in error in his reply brief that "The application made to the Special Term of the Supreme Court of the State of New York was made as of right and was not addressed to the favor of the Court."

In support of that contention, reference is made to Section 1268 of the Code of Civil Procedure of the State of New York.

A perusal of that section will show that the statutory authority to make application to the Court is only "for an order directing the judgment *to be canceled and discharged of record.*"

That section refers simply to a money judgment that *has been duly docketed* and which is released by a discharge in bankruptcy.

In the case at bar the judgment has not been docketed, except in respect to several installments of alimony and of moneys for the maintenance and education of the three children, amounting to $4,500, upon which the sequestration action was predicated and which installments had been paid long before the bankruptcy proceedings were instituted (see Record, page 109*j*.)

It will further be noted that the application was not made to have any judgment *canceled or discharged of record*, as authorized by that section, but the application was solely and distinctly for the obtaining of an *injunction restraining the collection of the amount which was due and unpaid at the time the petition in bankruptcy was filed* (see Record, p. 3). As the effect of the discharge in bankruptcy upon the arrears of alimony could have been determined in an action instituted by the plaintiff in error or by contempt proceedings instituted under the judgment of divorce, it was entirely discretionary with the Special

Term of the Supreme Court whether or not it would entertain an application by motion for an injunction. In fact, it is doubtful if the Court had jurisdiction to entertain such an application.

The judgment of divorce which was dated on the first day of April, 1892, was final, never having been modified or reversed upon appeal or otherwise.

We have stated that it is doubtful if the Court had jurisdiction to grant the application made by the plaintiff in error, and in that regard we again state that such application *was solely for injunctive relief.*

Under the law of New York, the only authority, which the Courts of that State have to issue an injunction, temporary or permanent, is found in the Code of Civil Procedure.

Spears *v.* Mathews, 66 N. Y., 127.
Jackson *v.* Bunnell, 113 N. Y., 216.

In Spears *v.* Mathews, *supra*, the Court of Appeals at page 128, referring to Fellows *v.* Heerman, previously decided by that Court, said:

> " The Court were of the opinion that the code defined and limited the power of the Court in respect to granting injunctions, and that the right to an injunction in any case, if it existed, was to be found in the provisions of the code. This decision was referred to in Erie RailwayCompany *v.* Ramsey (45 N. Y., 637), as establishing this proposition. The question is, therefore, *res adjudicata*

and we do not deem it useful to restate the grounds upon which this Court based its decision."

In Jackson *v.* Bunnell, *supra*, at page 219, the Court said:

"The Code has abolished the writ of injunction and substituted as a provisional remedy an injunction granted by an order (Code of Civ. Pro., § 602). It can be awarded only in the cases and in the manner specifically prescribed and is impliedly forbidden in any others (Fellows *v.* Heerman, 13 Abb. Pr. [N. S.], 9)."

It is submitted that under the law of New York no injunction based upon affidavits, as in the case at bar, can be granted in an action after the entry of final judgment, especially when such injunction would affect the judgment.

Bell *v.* City of Rochester, 30 N. Y. Suppl., 365.

Jackson *v.* Bunnell, 113 N. Y., 216, *supra.*

Spears *v.* Mathews, 66 N. Y., 127, *supra.*

In Bell *v.* City of Rochester, 30 N. Y. Suppl., 365, *supra*, the Court says :

"A court of equity derives its authority to grant an injunction order from the Code of Civil Procedure, and there is no authority in the Code authorizing the granting of an in-

junction upon affidavits after the final judgment has been obtained. It was held in Jackson *v.* Bunnell, 113 N. Y., 219, that under the laws of this State there is no authority for granting an injunction after final judgment. The restraint, if any, must be contained in the final judgment or it cannot be granted at all (Gardner *v.* Gardner, 87 N. Y., 18; Code of Civ. Pro., § 206; High Inj., Section 1591)."

There is no authority in the Code of Civil Procedure of New York which in any way authorizes or permits the making of an application in an action for a restraining order perpetually enjoining the enforcement of a final judgment previously made therein. Such relief can only be granted in an original action.

In Jackson *v.* Bunnell (*supra*) the Court, at page 220, says :

> "But a permanent injunction is in no sense a provisional remedy. It is always and must be final relief. A court of equity may grant it *in an action where the pleadings show its necessity, and the remedy is asked as an element of the final relief sought; but after judgment which does not award it, and which judgment is a final disposition of the action, there can be no permanent injunction granted upon affidavits and an order. In High on Injunctions* (§ *1591*), *it is said that there is no precedent for granting a permanent injunction upon affidavits.*"

There is nothing in Section 1268 set forth in the reply brief of the plaintiff in error, which

confers jurisdiction upon the Court to grant any injunction on the ground that a judgment debtor has been discharged in bankruptcy. The only relief there authorized is an application to *cancel and discharge a judgment which has been docketed*, and an application for an injunction is not such an application.

It would therefore follow that the application made by the plaintiff in error was not one which he could make as of right, and even though the Conrt had jurisdiction, which it did not, it would only be of such a character as to permit it to entertain the application for an injunction as a favor, for if it refused to hear the application or to grant the injunction the refusal of the Court would simply be relegating the plaintiff in error to a plenary action.

The case of Hovey *v.* Elliott, 167 U. S., 409, cited in the reply brief of the plaintiff in error has therefore no application. In that case it was merely held that the Court could not strike out a defendant's answer and enter a decree *pro confesso* on the merits, from the mere fact that he was in contempt of Court, holding that his right to be heard was such that the Court could not take it away even though he was in contempt. The opinion in that case, however, distinctly recognizes the fact that

> "The Court of Chancery commonly refused to hear a defendant in contempt when asking at their hands a favor" (p. 423).

SECOND POINT.

In this supplemental brief on the question of the plaintiff in error being in contempt, we simply desire to call the attention of the Court to the fact that the defendant in error was not proceeding against the plaintiff in error when he applied to the Special Term of the Supreme Court of the State of New York for an order perpetually restraining proceedings to collect the $19,221.60 due for arrears of alimony and for the support, maintenance and education of his three infant children, which is the order he now seeks to review in this Court.

If the defendant in error had instituted proceedings against the plaintiff in error in regard to such arrears and she had insisted that the plaintiff in error should not be heard because of his contempt, it might then be argued that in such case he could reply that he should first be adjudged to be in contempt by some order or judgment of the Court before he should be deprived of the right to defend himself. But that is not the manner in which the questions here arise, for the plaintiff in error on this application is asking affirmative relief in his favor, while as a matter of fact he is actually in contempt of the Court, as shown by the quotations from the

opinions in this cause of the different judges as set forth in the second point of the main brief of the defendant in error.

We believe we are sustained in this position by the case cited by the learned counsel for the plaintiff in error in his reply brief decided by this Court, which held that a pleading of a defendant who had been proceeded against could not be stricken out and he be deprived of the right to defend himself against the suit, merely because he was in contempt of court.

See Hovey *v.* Elliott, 167 U. S., 409, *supra*, which case recognizes that when a party asks a favor a court of equity can properly refuse to hear him while in contempt.

THIRD POINT.

As suggested on the argument in addition to what we have said on the subject in the main brief for the defendant in error, we submit that no Federal question is here presented to the Court, because no action or proceeding has been taken by the defendant in error, which has deprived the plaintiff in error of any rights which he has or may claim to have under his discharge in bankruptcy, and which has resulted in any final judgment or decree.

In other words, there is no practical question before the Court which enables the plaintiff in

error to maintain his writ of error on the ground that a Federal question is involved, which has been decided against him.

As already shown, the plaintiff in error could not make his application for injunctive relief as a matter of strict right, and that there was no authority in the Court to grant a permanent injunction upon affidavits after final judgment. It has also been stated that the plaintiff in error might commence an original action for the purpose of having his rights under the decree of bankruptcy determined. His present application by motion papers is not a proper way to raise the question, nor is it made at a proper time, as no proceedings were instituted against him by the defendant in error for the collection of any arrears. It is a well settled rule of this Court that it can review a judgment only when the right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States were specially set up or claimed in the State court *at the proper time and in the proper way.*

Sayward *vs.* Denny, 158 U. S., 180.
Chappell *vs.* Bradshaw, 128 U. S., 132.
Morrison *vs.* Watson, 154 U. S., 111.
Bobb *vs.* Jamison, 155 U. S., 416.
Leeper *vs.* Texas, 139 U. S., 462.
Spies *vs.* Illinois, 123 U. S., 131.
Baldwin *vs.* Kansas, 129 U. S., 52.
Brown *vs.* Massachusetts, 144 U. S., 573.
Duncan *vs.* Missouri, 152 U. S., 377.

Moreover, the order now sought to be reviewed is not a final judgment or decree within the Federal statutes nor within the decisions of this Court. The application for injunctive relief is made upon the simple fact that the plaintiff in error anticipates that the defendant in error may institute some proceedings against him for the collection of arrears (Record, p. 9). No such proceedings have been commenced by the defendant in error. The position of the plaintiff in error is not as strong as if process had been issued for the collection of the arrears. If such steps had been taken by the defendant in error and execution issued, the denial of an application made by the plaintiff in error to vacate such execution on the ground that the discharge in bankruptcy released the payment of such arrears could not be reviewed by this Court.

A writ of error will not lie to review an order of the highest court of a State overruling a motion to quash an execution as such order is not a final judgment within the contemplation of the judiciary act.

Loeber *vs.* Schroeder, 149 U. S., 580.

If a writ of error will not lie to review such an order, it is apparent that a writ of error will not lie to review an order denying an application to restrain the issuing of execution.

FOURTH POINT.

The judgment of divorce, so far as it contains provisions for alimony and for the payments to be made for the support, maintenance and education of the infant children, is not a fixed liability evidenced by a judgment.

To be a fixed liability the judgment must be for a specific sum, specifically determined to be due. If the plaintiff in error after the entry of judgment (say within a year thereof) had desired to relieve himself from any obligations thereunder and to pay the same, so far as it made provision for payment to the defendant in error, he could not have done so, because the judgment did not fix any specific amount which he could pay, the amount due being contingent upon the happening of various events, namely: the plaintiff in error might have died and his death would discharge the future operation of the judgment; the defendant in error might have died, after which time nothing would be due for further alimony; one, two or all of the three children might have died before attaining their majority, and the death of any child would have relieved the plaintiff in error from payment of $1,000 a year for the future maintenance and education of that child, and the same in regard to the other children in case of their deaths. If the plaintiff in error had desired to satisfy the judgment, so far

as alimony is concerned, by requiring the defendant in error to accept a gross sum based upon expectancy of life, she could not have been required to accept the same. Therefore, at no time was there any fixed amount due under the judgment, nor was there any way of telling what amount might ultimately be due.

FIFTH POINT.

It was not the intention of Congress in enacting the Bankruptcy Law, to discharge a husband from claims for arrears of alimony or arrears due for the maintenance and education of infant children as awarded by a judgment of divorce.

Nor are such claims, though provided for in a judgment of divorce, "A fixed liability as evidenced by a judgment" within the meaning of § 63*a* of the Bankruptcy Act of 1898.

See the following cases cited under Third Point on page 22 of the brief of defendant in error:

Audubon *vs.* Shufeldt, 181 U. S., 575.
Dunbar *vs.* Dunbar, 190 U. S., 340.
In re Nowell, 99 Fed., 931.
In re Shepard, 97 Fed., 187.
In re Anderson, 97 Fed., 321.
Turner *vs.* Turner, 108 Fed., 785.

In re Lachemeyer, 1 Nat. Bk. Rep., 270.
In re Garrett, 11 Bk. Rep., 493.
Matter of Smith, 3 Amer. Bk. Rep., 68.
Maisner *vs.* Maisner, 62 App. Div. (N. Y.), 286.
Young *vs.* Young, 35 Misc. (N. Y.), 335.
People *ex rel.* Buckle *vs.* Grell, 65 N. Y. Suppl., 522.
Bishop on Marriage and Divorce, Section 837.
And see Tinker *vs.* Colwell, 193 U. S., 473.

This is especially true as regards the award of alimony and for maintenance and education of infant children under a judgment of divorce granted in the State of New York.

In Maisner *v.* Maisner, 62 App. Div. (N. Y.), 286, *supra*, it was decided that "Arrears of alimony accruing before the filing of a petition by, or the granting of a discharge in bankruptcy proceedings, instituted by the husband under the Federal Bankruptcy Law, do not constitute a debt provable in the bankruptcy proceedings and are not covered by the discharge issued therein."

In that case it was unsuccessfully contended (as it is contended in this case by the plaintiff in error), that alimony was a fixed liability as evidenced by a judgment absolutely owing at the time of the filing of the petition whether then payable or not, and in that case the Court expressly

held that alimony was not a provable debt under Section 63 of the Bankruptcy Law.

In Dunbar *vs.* Dunbar, 190 U. S., 340, *supra*, Mr. Justice Peckham, writing the opinion of the Court, said at page 344:

> "Had the provisions of this contract, so far as contracting to pay money for the support of his wife is concerned, been embodied in the decree of divorce, which the husband obtained from his wife in Ohio on the ground of desertion, the liability of the husband to pay the amount as alimony, notwithstanding his discharge in bankruptcy, cannot be doubted (Audubon *vs.* Shufeldt, 181 U. S., 575)."

and after speaking of the contract, the subject of that action, which took the place of provisions for alimony and the support of children usually contained in judgments of divorce, and after considering the subject discussed generally in the case, said at page 349:

> "Section 63*a* provides for debts which may be proved which, among others are, (1) 'A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest on such as were not then payable and did not bear interest'; (4) 'founded upon an open account, or upon a contract express or implied.'"

and then said at page 350:

"In Section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph B, however, adds nothing to the class of debts which might be proved under paragraph A of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of Section 63*a*, to be liquidated as the Court should direct.

We do not think that by the use of the language in Section 63*a* it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.

The language of Section 63*a* of the Act of 1898, differs from that contained in the Bankruptcy Act of 1867, and also from that of 1841. The Act of 1867, Section 19, 14 Stat., 517, 525, carried into the Revised Statutes as Section 5068, provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt and permitted applications to be made to the Court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the Court should order and the creditor was then to be allowed to prove for the amount so ascertained.

Section 5 of the Act of 1841, 5 Stat., 440, provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act. But neither

the Act of 1841 nor that of 1867 would probably cover the case of such a contract as the one under consideration."

and at page 352:

"In the case of *In re* Hubbard, 98 Fed. Rep., 710, the District Court of Illinios held that a discharge in bankruptcy did not release the bankrupt from the obligation to obey an order made by a State court requiring him to pay a certain sum for the support of his minor children. Kohlsaat, District Judge, said:

'The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness, but it was not intended to, nor does it, subvert the higher rule which casts upon a parent the care and maintenance of his offspring. The welfare of the State, as also every principle of law, statutory, natural and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors, as well as all citizens, are interested in the enforcement of this rule.'

As the defendant would still remain liable for the support of his minor children, even if discharged from this contract under the act, and he would remain liable for past support, why should it be held that Congress intended that such a contract, to do what the law enjoins upon him as a duty, should be released? There is no language in the act which plainly so provides and we ought not to infer it.

The amendments to the bankruptcy act

passed in 1903, 32 Stat., 797, contain an amendment of Section 17 of the Act of 1898, which relates to debts not affected by a discharge, and it provides, among those not released by a discharge in bankruptcy, a debt due or to become due for alimony or for the maintenance or support of wife or child. It is true that the provisions of the amendatory act are not to apply to cases pending before their enactment. They are only referred to here for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife or children."

In Blake, Moffitt & Towne *v.* Francis-Valentine Co., 89 Fed. Rep., 691, the Court at page 693 says:

"The national bankruptcy act establishes a uniform system, and regulates, in all their details, the relations, rights and duties of debtor and creditor. It should be interpreted reasonably and according to a fair import of its terms, with a view to effect its objects and to promote justice. Black, Bankr., 274; *In re* Muller, Fed. Cas. No. 9,912; Silverman's Case, Fed. Cas. No. 12,855."

To the same effect is Southern Loan & Trust Co. *v.* Benbow, 96 Fed., 514, where the Court at page 528 says

"that the Bankruptcy Act is remedial and should be interpreted reasonably and according to a fair import of its terms, with a view to effect its objects and to promote jus-

tice. *In re* Bruss-Ritter Co., 90 Fed., 651; *In re* Christy, 3 How., 292; Nugent *v.* Boyd, *Id.*, 426; Houston *v.* Bank, 6 How., 504)."

SIXTH POINT.

We therefore respectfully ask on behalf of the defendant in error that, unless the writ of error shall be dismissed, that the order sought to be reviewed in this Court be affirmed.

Dated November 14, 1904.

Respectfully submitted,

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